No. 21572

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

IDAHO ELECTRIC COMPANY, INC., RESPONDENT

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

ARNOLD ORDMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
MARCEL MALLET-PREVOST,
Assistant General Counsel,
H. M. LEVY,
Attorney,
National Labor Relations Board.

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JURISDICTION

This case is before the Court upon petition of the ational Labor Relations Board to enforce its order sued against Idaho Electric Company, Inc., here- ter called respondent or Company, on March 16, 966, following proceedings under Section 10(c) of ie National Labor Relations Act, as amended (61 tat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, *et seq.*).[1] he Board's decision and order are reported at 157

[1] Pertinent provisions of the Act are set forth *infra* in Appendix A.

NLRB No. 70 (R. 37–38).[2] This Court has jurisdi
tion over the proceedings under Section 10(e) of th
Act, since the unfair labor practices occurred i
Jerome, Idaho, within this judicial circuit, where th
Company is engaged in business.

STATEMENT OF THE CASE

I. The Board's findings of fact

The Board found that the Company violated Sec
tion 8(a) (5) and (1) of the Act by refusing to bar
gain with the Union,[3] which had been selected by a
majority of its employees as their exclusive bargain
ing representative in a unit appropriate for collec
tive bargaining. The Board also found that th
Company violated Section 8(a)(1) of the Act by in
terrogating its employees regarding their Union ac
tivities and sympathies and the identity of th
employee who led the Union movement in the plant
by unilaterally granting wages increases to employee
Burk and Castro; by unilaterally changing em
ployees' working rules; and by threatening to with

[2] The original papers in the case have been reproduced an
transmitted to the Court pursuant to its Rule 10(2). "R." refer
to the formal documents bound as "Volume I, Pleadings;
"Tr." refers to the stenographic transcript of testimony at th
unfair labor practice hearing. References designated ("GCX
and "RX" are to exhibits of the General Counsel and re
spondent, respectively. Whenever in a series of references
semicolon appears, references preceding the semicolon are t
the Board's findings; those following, to the supporting evi
dence.

[3] Local Union No. 449, International Brotherhood of Elec
trical Workers, AFL–CIO.

aw and withdrawing certain employee benefits ecause of the employees' Union activities. The evi- nce upon which the Board based its findings is mmarized below.

Respondent, a General Electric Company sales nchise dealer, is engaged at Jerome, Idaho, in the eration of (1) a retail electric appliance store,) a general service department for servicing of ctrical appliances and (3) a department for doing ctrical wiring work either as a general contractor as a subcontractor to general building contractors . 18–19, 24; Tr. 2, 18, 21, 23, 32–35, 38).

A few days prior to January 21, 1965,[4] six Company ctricians went to Union headquarters in Twin lls, Idaho and conferred with Union President rnest Lee about joining the Union (R. 21; Tr. 131– 2). At this time the Company employed thirteen ctricians (R. 21; Tr. 14–16, GCX 2). On January , nine Company electricians met with Union of- ials at Twin Falls and each signed a Union author- ation card and an application for Union member- ip (R. 21, Tr. 59–62, 131, GCX 5a–5h). A few ys thereafter, Union business manager Gerald eddes called Bert Hartwell, respondent's treasurer d co-owner, and requested that Hartwell sign a con- act with the Union (R. 22; Tr. 62–63); Hartwell fused to negotiate with the Union (R. 22; Tr. 63). n the week following this conversation, Geddes called e Labor Commissioner of the State of Idaho and quested that an election be conducted among Com-

[4] Unless otherwise noted, all dates refer to 1965.

pany employees to establish the Union's majority status. Geddes was told to put the request in writing which he did (R. 22; Tr. 63–64).

About a week after the employees had first visited the Union, Hartwell asked employee James Burk, Jr. if the employees had gone to Twin Falls to inquire about joining the Union (R. 22; Tr. 112). When Burk replied in the affirmative, Hartwell asked who the ringleader was; Burk answered that he didn't know for sure (R. 22; Tr. 112). On about January 23, Alfred Hall, respondent's president and co-owner, asked employee Ralph Gardner what the employees had signed at the Union meeting on January 21 (R. 22; Tr. 130–131). Gardner told him that nine employees had signed authorization and membership cards and named the individual employees (R. 22; Tr. 131). Gardner wrote each name on a list (Tr. 131–132). Hall then inquired which of the employees had gone to the Union the first time to inquire about joining. As Gardner named the six employees, Hall checked their names from the list, he had just compiled (R. 22; Tr. 132). Hall further inquired whether employee Bruce Rosen was the leader of the Union movement and Gardner replied he was not (R. 22; Tr. 132). When Hall asked what Gardner expected "to get out of the Union," Gardner replied "it would be a better shop" if the Company was unionized (R. 22; 132).

On about January 28, President Hartwell commented to employee Gordon Bullock, "I hear you fellows had a big Union meeting the other night;" Bul-

ck confirmed this fact (R. 22; Tr. 140). Hartwell rther told Bullock that he had first heard of this atter when Union business agent "Geddes called e up and said you guys all signed up. I don't know ow much of what he says I can believe but I thought would ask." Bullock replied that, "I don't know hat he told you, but if he said we signed up to join ie Union, I know that much is true" (R. 22; Tr. 40). Hartwell also asked if Bullock thought a Union iop would make it in their area, to which Bullock plied, "I do, there are other union shops that seem be making it." (R. 22; Tr. 140) Hartwell concluded this conversation by inquiring "Who started iis?" Bullock answered that he did not think any idividual started it. "A group of us got together nd decided the best thing for us to do would be to elong to a Union" (R. 22; Tr. 140).

During the latter part of January, co-owner Hall ssembled employees Wilford Allison, Howard Bevens, Gardner and Rosen in the back room of the tore (R. 22; Tr. 92, 133, 126). Hall told these employees that if they wanted a union shop they would ave one. He added, however, that if the Union should rganize the plant, "there will be some changes made," ncluding the elimination of shop picnics, boat rides, hop parties, bonuses and certain fringe benefits (R. 2–23; Tr. 92–93). Hall accused Rosen of being the Union ringleader, and told Bevens, "So far as you are oncerned, if you put forth a little more effort and a ittle less talk you would get along a lot better" R. 23; Tr. 93, 126).

About a week after this meeting, Hall assembled all the employees and asked "What is the difficulty?" No one answered. When Hartwell arrived about ten minutes later, he asked Hall, "What is the deal?" Hall repied, "I can't find out." The meeting was then adjourned (R. 23; 94–95).

On February 5, the Idaho Department of Labor held a secret ballot election among Company electricians (R. 23; Tr. 28). The Company had supplied a list of thirteen employees whom it considered eligible to vote (Tr. 23; Tr. 15, GCX 2). Hartwell and Geddes acted as Company and Union observers respectively (Tr. 23; Tr. 28). The Union won the election 8 to 5 and was certified by the Idaho Department of Labor (R. 23; Tr. 30, GCX 3). Immediately thereafter, Geddes presented a proposed collective bargaining agreement to Hall and Hartwell. Both owners said they wanted time to consider the contract and Geddes replied he would talk to them sometime later to answer any questions they might have (R. 23; Tr. 64). When Geddes called respondent on February 8, he was told to contact respondent's counsel, Eli Weston (R. 25; GCX 6).

On February 8, Hall held an employee meeting. Hall acknowledged that the Union had won the election, remarking, "you boys won with a count of 8 to 5." He then announced that "there will be some changes made around here" (R. 23; 95–96). The changes in work rules which he then announced affected the reporting and quitting time, coffee breaks, preparation and submission of daily and weekly reports, turning in shop keys, taking home Company

pick-up trucks, and carrying firearms in the pick-up trucks (R. 23; Tr. 96–98, 115–118, 128).[5] At the end of the meeting, Hall told employee Rosen that he had filed a "coercion charge" against Rosen and told employee Bevens that he was fired (R. 23; Tr. 99, 116).

On February 8, Company counsel Eli Weston wrote to the Idaho Labor Commissioner, contesting the election. Weston alleged that Idaho law required that a hearing be held before the holding of an election and that if such a hearing had been held, the Company would have shown one employee "made serious threats to at least ten of the employees on one or two occasions." Counsel also suggested that since the Company received more than $50,000 of materials in interstate commerce, the Company might well be subject to N.L.R.B. jurisdiction, rather than to that of the state labor department. (R. 24; RX 2)

Sometime after the election the Company raised employee Burk's wage from $2.20 to $2.40 an hour. About a month later, the Company gave employee Roland Castro a wage increase. In neither case did the Company notify or consult with the Union concerning the increase (R. 24; 26; Tr. 110–111, 37).

[5] The rules put in effect the following changes which had not previously been required by the Company: work started at 8:00 a.m. and all employees were to return to the shop at 4:30 p.m.; all daily and weekly reports were to be prepared and turned in; employees were prohibited from taking Company pick-up trucks home; coffee breaks were to be taken at no more than one minute's walking distance from the job; the entire crew could not take coffee breaks together; firearms, which might be used for pheasant shooting, were not to be carried in the trucks; shop keys were to be turned in.

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On February 13, Geddes went to respondent's shop and was told by Hall that respondent would not meet with him except in Counsel Weston's presence (R. 24; Tr. 65, GCX 6). On February 23, Geddes telephoned Weston and explained that he would like to discuss a collective bargaining agreement with the Company. Weston replied that "he was busy," that "he didn't have any background into the case" and that he would "call back as to when we could set down and meet" (R. 24; Tr. 66–67; GCX 6). On February 24, Geddes again called Weston who stated did not know the facts of the case yet but would endeavor to do so soon (R. 25; Tr. 67–68). On February 25, Geddes telephoned Hall and requested that a meeting be arranged with Weston to discuss a contract. Hall replied that as soon as Weston "got around to it we would meet" (R. 25; Tr. 68, GCX 6).

On February 26, Geddes wrote to Hall and Hartwell outlining all the events which had occurred since the employees designated the Union as their bargaining representative on January 21 and the Union's attempts to negotiate a contract with the Company. Geddes requested that the Company arrange a meeting with Mr. Weston present on March 1 or 3 (R. 8–9; GCX 6). In a letter of reply that same day, Weston stated that the Company believed the election had been conducted "under conditions * * * not conducive to a proper vote," and suggested a second election. The letter also indicated that "because of the question of the proper unit," the Company was requesting a hearing before the Commissioner of Labor (R. 26; RX 4).

On March 2, employee Rosen telephoned Geddes nd informed him that the employees intended to trike if the Company refused to meet with the Jnion. Geddes advised Rosen to "keep the people n the job," that he would be there by noon the fol-owing day and that he would "again try to get a neeting with the Company" (R. 26–27; Tr. 69). Rosen inquired of Hartwell the same day if any rogress was being made in arriving at an agree-nent. Hartwell replied there was no progress. Rosen nformed Hartwell that all the employees intended o walk off the job the next day (R. 27; Tr. 100).

On March 3, at 12:30 p.m., the employees went out n strike (R. 27; Tr. 100). Hall approached them at his time and inquired whether they would return to vork. Employee Bullock replied that until they got a contract they had decided not to work (R. 27; 142, 101). The employees returned their trucks and equip-nent to the plant. At this time Hall remarked to a group of them, "You men made your nest, now you can sleep in it. You'll hear from us." (R. 27; Tr. 102).

On March 5, Geddes called Weston and discussed having a meeting. Geddes requested that Weston ar-range with the Company to have the employees report back to work on March 8 and to call him back if this arrangement was not satisfactory; Weston did not recall Geddes. On March 8, the employees reported to work. Employee Rosen explained to Hall and Hart-well that Geddes and Weston had arranged the return to work (R. 27; Tr. 74–76). Respondent said that nothing had been settled and the employees returned home (R. 27; Tr. 103).

123 NLRB 543, 544.[8] As we show *infra,* the Board properly asserted jurisdiction in this case.

There can be no question but that on the basis of the interstate commerce facts, the Board has statutory jurisdiction over respondent. *N.L.R.B.* v. *Reliance Fuel Co.,* 371 U.S. 224; *Polish National Alliance* v. *N.L.R.B.,* 322 U.S. 643, 647–648. Since the Board possesses statutory jurisdiction over respondent, "the extent to which that jurisdiction will be exercised is a matter of administrative policy within the discretion of the Board." *Lucas County Farm Bureau Cooperative Association* v. *N.L.R.B.,* 289 F. 2d 844, 845–846 (C.A. 6), cert. denied, 368 U.S. 823. Accord: *N.L.R.B.* v. *Stoller,* 207 F. 2d 305, 307 (C.A. 9).

The admitted facts set forth in the Company's letter to the Idaho Commissioner of Labor reveal that the Company is engaged in both retail and non-retail operations. Thus, the letter states that "The Idaho Electric Company is actually engaged in three separate types of operations. The Company has a retail appliance store, in which they employ clerks and service men; the Company also operates a service department for local customers; and third has a department for handling contracts for wiring and other electrical contract work as a sub or general contractor" (RX 2). The testimony of the Company owners fully supports the above statements concerning the nature of their business (Tr. 18, 21, 23, 32–35, 38). The testimony further shows that during the relevant period in this case

[8] The Board will assert jurisdiction over non-retail enterprises which have an inflow or outflow across state lines of at least $50,000. *Siemons Mailing Service,* 122 NLRB 81, 85.

the Company realized over $100,000 from its electrical work at construction jobs which the Board considers the non-retail portion of the Company's operations (R. 38; Tr. 41–42). The record also shows that the Company during 1964 was involved in electrical wiring for over a dozen construction jobs (Tr. 32–35). The Company admits that it purchased goods valued in excess of $50,000 from the General Electric Company and other suppliers in the state of Idaho who in turn had acquired such goods directly from outside the state (R. 5, 10; Tr. 42). Since these facts show that the Company is both a retail and non-retail enterprise which purchased goods originating outside the state, valued in excess of $50,000, and that the non-retail aspect of the business is not *de minimis,* we submit that the Board properly applied its jurisdictional standard for non-retail enterprises and properly asserted jurisdiction over the Company.

II. Substantial evidence supports the Board's finding that the Company violated section 8(a) (5) and (1) of the Act by refusing to bargain with the Union which had been selected as bargaining representative by a majority of its employees

The undisputed facts in the record as shown *supra,* reveal that a majority of the Company employees in an appropriate unit of electricians joined the Union and designated it as their exclusive bargaining representative on January 21.[9] A few days thereafter,

[9] The Board found the appropriate unit to be all respondent's electricians including apprentices, but excluding guards and supervisors as defined in the Act (R. 20). The Company did not contest the unit at the hearing or in its exceptions to the Trial Examiner's finding. See *N.L.R.B.* v. *Sunrise Lumber and Trim Corp.*, 241 F. 2d 620, 624 (C.A. 2), cert. denied 355 U.S. 818).

Union agent Geddes requested the Company to sign a collective bargaining agreement with it as the representative of its employees. The Company refused. There can be no question but that in the latter part of January, the Company was fully aware of its employees' union activities and the fact that a majority of its employees had joined the Union. Thus, in its questioning of employees Gardner and Bullock, the Company learned not only that a majority had signed Union cards but it also elicited the names of the nine employees who constituted the majority. Respondent has never challenged the Union's majority status. See *N.L.R.B.* v. *Overnite Transportation Company,* 308 F. 2d 279, 283 (C.A. 4).

Subsequent Union requests for the Company to bargain, beginning on February 5, were marked by excuses and procrastination, interspersed by the Company's commission of unfair labor practices. Thus, the record shows that when the Union presented a bargaining agreement to Hall and Hartwell on February 5, the Company owners requested time to consider the contract. On February 8, respondent told Union agent Geddes that he must discuss bargaining with Company counsel Weston. On February 13, Hall told Geddes that there could be no bargaining meeting except in the presence of counsel. On February 23, in reply to Geddes' request to meet and bargain, counsel Weston replied that "he was busy" and "didn't have the background in the case." On February 24, Weston told Geddes that he did not know the facts yet but would endeavor to learn them soon. On Feb-

uary 25, co-owner Hall met Geddes' request for a bargaining meeting with the response that they would meet as soon as their counsel got around to it. On February 26, Geddes requested by letter that a meeting be arranged for March 1 or 3. Weston answered by suggesting that the recent State labor department election was improper. On March 8, Geddes again called Weston to arrange a meeting. On March 11, Geddes wrote Weston requesting a meeting to negotiate a contract. No meeting has been held. It is evident from these facts that the Company was not making a sincere, good faith effort to meet with the Union. It is well settled that an employer's refusal to meet and bargain under such circumstances, against a background of other unfair labor practices (see *infra,* pp. 17–19), constitutes a violation of Section 8(a) (5) and (1) of the Act. *N.L.R.B.* v. *Security Plating Company,* 356 F. 2d 725, 726–727 (C.A. 9); *N.L.R.B.* v. *Trimfit of California,* 211 F. 2d 206, 210 (C.A. 9; *N.L.R.B.* v. *Idaho Egg Producers,* 229 F. 2d 821, 823 (C.A. 9); *N.L.R.B.* v. *Howard-Cooper Corp.,* 259 F. 2d 558–560 (C.A. 9); *N.L.R.B.* v. *Scott & Scott,* 245 F. 2d 926, 927 (C.A. 9).

Respondent contends in its exceptions to the Trial Examiner's decision that it has not violated Section 8(a) (5) and (1) of the Act because the election conducted by the Idaho Department of Labor, which resulted in an 8 to 5 victory for the Union and its certification, was "illegal, improper and contrary to both State and Federal law" (R. 33). Respondent alleges that state law required that it be afforded a hearing prior to the holding of the election and that

such a hearing was not held. In addition, respondent contends that employee Rosen threatened employees just prior to the election in an effort to force them to vote for the Union. The short answer to respondent's contention is that neither the legality of the state election nor the results of the election are at issue in the instant case. The Board has specifically noted that "it would serve no useful purpose to here resolve the question of whether or not said election was properly conducted" (R. 21) and, accordingly, the Board did not consider the results of the election in determining that the Union's majority status. The other facts upon which the Board relied, detailed *supra,* afford ample support for the Board's conclusion that when the Company refused the Union's request to bargain, the Union represented a majority of Company employees.

Respondent's contention that an alleged threat by employee Rosen immediately before the state election immunizes it from a finding that respondent refused to bargain, is equally without merit.[10] Rosen denied making any threats to any employees (Tr. 109). Assuming *arguendo,* the truth of the allegation that such a threat was made, under circumstances that

[10] In its letter to the State Commissioner of Labor, respondent alleged that Rosen made serious threats to at least ten of the employees in the unit on one or two occasions (RX 2). In the instant case, respondent produced two employees who testified to the alleged threat made to a few employees on one occasion (Tr. 147–150). The two witnesses testified that Rosen threatened "to bust them in the mouth" if they voted for the Union. None of the six other employees who appeared in the instant case, however, were questioned about the alleged threat.

night have affected the result of the election, this still could not justify the Company's refusal to bargain; for the Union, as the Company well knew, already represented a majority of its employees on the basis of cards signed before the alleged threat. Nor is there evidence in the record to suggest that Rosen exerted any pressure to have his fellow employees join the Union prior to the time respondent alleges Rosen made the threat. Indeed, the record indicates that Rosen was not aware that employees intended to inquire about joining the Union until he was called by his co-workers to accompany them to Union headquarters for the purpose of introducing them to Union President Lee whom Rosen knew. See *N.L.R.B.* v. *Overnite Transportation Company,* 308 F. 2d 279, 283 (C.A. 4). In short, there is no basis for any contention that the Union did not represent an uncoerced majority of Company employees when the Union made its request to bargain and accordingly the Company's refusal to bargain violates Section 8(a) (5) and (1) of the Act.

III. Substantial evidence supports the Board's finding that the Company violated Section 8(a)(1) of the Act

While refusing to negotiate with the Union, the Company at the same time engaged in a course of conduct which interfered with, restrained and coerced employees in the exercise of their Section 7 rights and which was calculated to undermine the Union's majority. The Board's findings that this conduct violated Section 8(a)(1) are supported by substantial evidence in the record. Thus, the record shows that co-owner

Hartwell in the latter part of January questioned employees Burk and Bullock about their co-workers' interest in the Union and the identity of the Union ringleader. President Hall quizzed employee Gardner as to which employees had initially inquired about joining the Union and which employees subsequently joined the Union. Hall further inquired whether Bruce Rosen was the leader of the Union movement. It is clear from the facts in this case that the Company was not making these inquiries for any purpose permitted by the Act but rather as part of its attempt to interfere with their employees' union activities.

Later, Hall assembled a group of employees and announced that if the Union organized the plant "there will be some changes made," including the elimination of shop picnics, boat rides, shop parties, bonuses and certain fringe benefits. About a week thereafter, when the results of the state election were known, Hall again assembled the employees, acknowledged that the Union had won the election and announced "there will be some changes made around here." At this time Hall read a list of changes in work rules which affected the reporting and quitting time, coffee breaks, preparation and submission of job reports, turning in keys and pick-up trucks and the carrying of firearms in trucks.

Sometime after the election the Company gave wage increases to employees Burk and Castro without notifying or consulting with the Union.

It is well settled that such conduct, which interferes with, restrains and coerces employees in the exercise

of their guaranteed Section 7 rights, violates Section 8(a)(1).[11]

Respondent characterizes its activities as one or two "casual, unrelated statements" and contends that "the employer has been [found] guilty of an unfair labor practice by talking to the employees" (R. 33). The record refutes this defense on the facts; the cited cases demonstrate its inadequacy at law.

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[11] Interrogations of employees concerning union activities and identity of leaders: *Bon Hennings Logging Co.* v. *N.L.R.B.*, 308 F. 2d 548, 552–553 (C.A. 9); *N.L.R.B.* v. *Lozano Enterprises*, 318 F. 2d 41, 42 (C.A. 9); *N.L.R.B.* v. *Ace Comb Co.*, 342 F. 2d 841, 843 (C.A. 8); *N.L.R.B.* v. *Wings & Wheels*, 324 F. 2d 495, 496 (C.A. 3); *N.L.R.B.* v. *Smith*, 209 F. 2d 905 (C.A. 9); *N.L.R.B.* v. *Victory Plating Works, Inc.*, 325 F. 2d 92, 93 (C.A. 9).

Threatening withdrawal of benefits; withdrawal of benefits: *Edward Fields Inc.* v. *N.L.R.B.*, 325 F. 2d 754, 760 (C.A. 2); *N.L.R.B.* v. *Idaho Egg Producers*, 229 F. 2d 821, 823 (C.A. 9); *N.L.R.B.* v. *Hazen*, 203 F. 2d 807 (C.A. 9); *N.L.R.B.* v. *Dixie Gas, Inc.*, 323 F. 2d 433, 434 (C.A. 5); *N.L.R.B.* v. *McCarthy Motor Sales Co.*, 309 F. 2d 732, 734 (C.A. 7); *Ridge Growers* v. *N.L.R.B.*, 211 F. 2d 752, 755–756 (C.A. 5).

Giving wage increases without notifying bargaining representative: *Medo Corp.* v. *N.L.R.B.*, 321 U.S. 678, 683; *N.L.R.B.* v. *Hyde*, 339 F. 2d 568, 571–572 (C.A. 9); *N.L.R.B.* v. *Chain Service Restaurant etc.* 302 F. 2d 167, 171–172 (C.A. 2); *N.L.R.B.* v. *Parma Water Lifter Co.*, 211 F. 2d 258, 263 (C.A. 9), cert. denied 348 U.S. 829.

APPENDIX B

Pursuant to Rule 18.2(f) of the Rules of the Court:

(Numbers are to pages of the reporter's transcript)

Board Case No. 19–CA–3065

GENERAL COUNSEL'S EXHIBITS

Number	Identified	Offered	Received in Evidence
1A–1H	6	6	6
2	15	31	31
3	30	31	31
4	57	57	58
5A–5H	61	61	62
6	65	68	69
7	77	78	78
8	78	78	78

RESPONDENT'S EXHIBITS

Number	Identified	Offered	Received in Evidence
1	56	56	56
2	86	86	86
3	86	87	87
4	87	87	87
5	87	88	88
6	88	88	88
7	154	154	155

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